U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036

DATE: JAN 12 1989
CASE NO. 88-INA-8

IN THE MATTER OF:
CHROMATOCHEM INC.,
Employer,

on behalf of,
DAVID CHUNG-I PANG,
Alien.

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and Brenner, DeGregorio, Guill, Tureck and Schoenfeld
Administrative Law Judges

MICHAEL H. SCHOENFELD
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

We are asked to review the decision of the Certifying Officer denying Employer's application for labor certification. The Certifying Officer denied Employer's application on the grounds that Employer rejected qualified applicants without documenting why they could not perform the job.

We affirm the decision of the Certifying Officer and deny labor certification. Employer did not meet its burden to prove that applicants were rejected solely for lawful job-related reasons.

Facts

On January 9, 1987 ChromatoChem ("Employer") filed an application for labor certification on behalf of David Chung-I Pang ("Alien") (AF 63-64). Employer seeks to hire Alien as an Organic Chemist. The only job requirement as listed in the application form ETA 7-50A ("7-50A") is that of a Master's Degree in Organic Chemistry. (AF63) The advertisements were worded the same. (AF 66-78) Twenty-five responses to the advertisement were received (AF-ALJ 1 -69; AF 28-37). All were rejected either for not possessing a Master's Degree in Organic Chemistry or for not possessing experience in high performance liquid chromatography (AF27; AF-ALJ 1-69).

The Certifying Officer ("C.O.") issued a Notice of Finding ("NOF") on June 3, 1987 (AF54-59). The C.O. found that the regulations had not been complied with in regard to advertising the position, posting notice and offering the prevailing wage. The C.O. also found that Employer had failed to show it had rejected U.S. workers solely for lawful job-related reasons and had thus violated §656.21(b)(7). Specifically, the C.O. found that despite the fact that some applicants did not possess a Master's Degree in Organic Chemistry, some applicants would be qualified for this position by virtue of a combination of their education, training and experience. The C.O. directed Employer to either recontact and interview the rejected applicants or to submit documentation to support why each applicant could not perform the job (AF57).

Employer filed a Rebuttal on June 24, 1987. (AF41-53) In it, Employer addressed some of the C.O.'s procedural concerns. Additionally, Employer contended that it had rejected U.S. workers solely for lawful job-related reasons (AF46). Employer disagreed with the C.O.'s interpretation of the regulations and maintained that it legally rejected applicants who failed to meet the minimum requirements on the face of their resumes (AF44). Employer concluded that as all applicants were rejected for failure to have the required Master's degree or failure to have experience in high performance affinitive chromatography, all rejections were for job-related reasons pursuant to the regulations. Employer maintained that "[t]hese requirements were clearly set forth in Item No. 13 of the ETA 750A. . . " (AF46).

On July 17, 1987 the C.O. issued a Second Notice of Findings ("SNOF") (AF 39-40). The SNOF found Employer in continued violation of §656.21(b)(7). The SNOF instructed Employer

to recontact U.S. applicants so as to set up interviews (AF40). The SNOF again instructed Employer to document why rejected applicants could not perform the job (AF40).

Employer filed a second Rebuttal on August 1, 1987 (AF24-38). Employer again asserted that its rejections of all the applicants were in accordance with the regulations (AF26). Employer stated that it had re-reviewed all of the resumes and that none of the applicants met the minimum requirements. Employer stated that it "considered" experience in high performance affinity chromatography ("HPAC") to be a minimum requirement and that such experience was "essential to perform the job duties set forth in Item 13 of ETA 750 Form" (AF26). Finally, Employer again asserted that U.S. applicants were rejected only because of the lack of a Master's Degree or the lack of HPAC experience.

The C.O. issued a Final Determination ("FD") on August 26, 1987, rejecting Employer's application for labor certification (AF21-23). The C.O. determined that Employer had disregarded both NOF's and had failed in its burden of proof to document compliance with the regulations. Specifically, the C.O. found that Employer had not documented that applicants could not perform the job duties. The C.O. listed several applicants she considered qualified, one of whom had a Master's Degree in Organic Chemistry. The C.O. also mentioned a rejected applicant who possessed a Ph.D. in the required field. The C.O. determined that the above were able, willing, qualified and available for the job opportunity. (AF23).

Discussion

Ordinarily, an applicant is considered qualified for a job in terms of his or her education, training and experience if the applicant meets the minimum requirements specified for that job in the labor certification application. Bel Air Country Club, 88-INA-223 (December 23, 1988). The NOF and SNOF put Employer on notice that it had to document that U.S. applicants were lawfully rejected. The C.O. properly attributed this burden of proof to Employer as required by §656.2(b).

Of the 25 applicants, two had Master's Degrees in Organic Chemistry (AF-ALJ 12-13, 18-21) and one had a Ph.D in Organic Chemistry (AF-ALJ 22-25). All three were rejected by Employer because of a lack of HPAC experience. Two other applicants, one expecting a Ph.D in chemistry and one with a Master's Degree in Chemistry were rejected solely because they lacked HPAC experience, and not because of any lack in education (AF-ALJ 6-8, 26-28). The C.O. correctly points out in her brief that this experience was never a requirement; rather, use of HPAC technology was listed on the 7-50A Form as a job duty.

Employer stated in its Rebuttal that HPAC experience is an "essential requirement[s]. . . as set forth on the ETA 750 form" (AF45), and that such experience was clearly set forth in Item No. 13 of the 7-50A form (AF46). Nowhere, however, does Employer assert that HPAC experience was a minimum requirement and so listed in Item No. 14 or 15 of the form. Indeed, no experience was required at all, but only a Master's Degree in Organic Chemistry (AF63). The first time Employer referred to HPAC experience as ""requirement" was in its Rebuttal, after having received several resumes that met the sole minimum requirement of a Master's Degree in

Organic Chemistry. Employer cannot add additional minimum requirements to a position after advertising and receiving qualified responses.

Both NOF's put Employer on actual notice that it had not adequately documented its rejection of U.S. applicants. Employer rejected applicants that met the minimum requirements and failed to meet its burden of proof to show that the rejections were solely for lawful job-related reasons, and so violated §656.21(b)(7). Accordingly, the denial of certification will be affirmed.

ORDER

The decision of the Certifying Officer to deny labor certification is affirmed.

MICHAEL H. SCHOENFELD
Administrative Law Judge

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